How feminism could improve judicial decision-making

What difference would it make if a judge's feminist values and perspectives were included in their decision-making?

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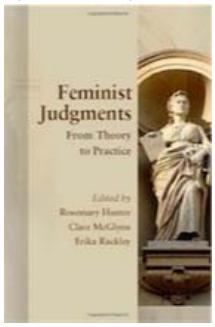
Baroness Hale of Richmond believes that reading the judgments 'ought to be a chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world'. Photograph: Dan Kitwood/Getty Images

Can judges be feminists? Should judges be feminists? On one view the answer is easy: no. We don't want our judges to be activists. We don't want them to promote their own political agendas. We want them to do their job. We want them to apply the law.

Feminist Judgments: From Theory to Practice
by Rosemary Hunter, Clare McGlynn, Erika Rackley



Now, of course, we can all agree that we want our judges to take their judicial responsibilities seriously. But judges – especially those at the highest levels – are often called on to make decisions where the existing legal rules provide no clear answer. In such cases, the judge must turn to their own sense of justice, of what is right and wrong, to decide the case. And this will differ from judge to judge. None of this is controversial.

Judges often disagree, and not simply on what the authorities say but on the direction the law should take.

So, given that judges will, sometimes, have no choice but to fall back on their own values and perspectives, why shouldn't feminist values and perspectives be included? And if they were, what difference might this make to the law and the way cases are decided?

The Feminist Judgments Project offers a vision as to what the law might look like if there were (more) feminist judges, and in doing so, challenges our thinking about law and judging. More than 50 academics, practitioners and activists have come together to produce 23 alternative feminist judgments in a series of key cases in English law.

In R v A (No 2), for example, instead of rules restricting the use of sexual history evidence in rape trials being overturned by an all-male House of Lords (itself the subject of a legal challenge by the Fawcett Society), the feminist judgment by Clare McGlynn upholds the restrictions, challenging the assumption at the heart of the case: that a woman who has agreed to have sex with a particular man is – simply by virtue of that fact – more likely to do so again at another time.

Other cases include attorney-general for Jersey v Holley, in which Susan Edwards dissents from the majority of the Privy Council. She argues that the defence of provocation should be sensitive to the specific circumstances and capacities of the defendant, which would go some way to redressing the law's inadequate treatment of women who kill their abusive partners. In Evans v Amicus Healthcare Ltd, Sonia Harris-Short holds that, contrary to the court of appeal judgment, Natalie Evans should have been allowed to use frozen embryos stored prior to her treatment for ovarian cancer – her only chance to have a genetically related child – despite her former partner's objections.

While many of the feminist judgments argue for different results, others reach the same conclusions but for different reasons, highlighting details of women's lives and raising argument that the courts overlooked. In some cases, they reveal different feminist views on a particular issue. Alison Diduck's judgment in Re G (Children) (Residence: Same Sex Partner) is a case in point. Although she finds much to agree with in Baroness Hale's leading opinion – itself perhaps an example of a feminist judgment – Diduck rejects Hale's attempt to treat the former lesbian partners in the same way as a heterosexual couple. She argues that it obscures specific difficulties faced by same-sex parents.

The feminist judgments reveal the extent to which cases could – and should – have been decided differently, while remaining within the same legal and constitutional constraints that bind appellate judges. These are all decisions the courts could legitimately have reached. The important point is that cases such as these can only be decided by the application of a set of values – whether feminist or other.

As Baroness Hale writes in her foreword to the collection, reading the judgments 'ought to be a chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world'.

Moreover, the judgments help us see how the incorporation of viewpoints and perspectives from sections of society which remain under-represented on the bench might improve the quality of judicial decision-making.

The book Feminist Judgments: From Theory to Practice (edited by Rosemary Hunter, Clare McGlynn and Erika Rackley) is published by Hart Publishing. The Feminist Judgments Project was funded by the ESRC.